Office Supreme Court, U.S.
FILED
MAY 9 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 955

T. Y. FONG, Individually and Trading as ASIA DEVELOPMENT CORPORATION and as HONG KONG SHIPPING CORPORATION, LTD., *Petitioner*

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SMITH W. BROOKHART
RALPH E. BECKER
BENJAMIN H. DORSEY
F. MURRAY CALLAHAN
Attorneys for Petitioner
1700 K St. N. W.
Washington 6, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision, Statutes and Rules Involved	3
Statement of the Case	3
Argument	21
Conclusion	26
Appendices	
A. Opinion	27a
B. Judgment	27a
C. Constitutional Provision, Statutes and Rules Involved	27a

CITATIONS

Cases:

Cahill v. Curtiss-Wright Corp., 57 F. Supp. 614	25
Coppedge v. U.S., ... U.S. ...., 30 USLW 4303	24, 25
Cragin v. Lovell, 109 U.S. 194	23
Demeulenaere v. Rockwell Mfg. Co., 23 FRD 686	21
Duell v. Duell, 178 F. (2d) 683	21
Eastern Industries v. Traffic Controls, 142 F. Supp. 381	23
Gill v. Stolow, 240 F. (2d) 669	26
Hammond Packing Co. v. Arkansas, 212 U.S. 312	22
Hovey v. Elliott, 167 U.S. 409	24
Kent v. Dulles, 357 U.S. 116	24
Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 683	23
Olson v. Melon, 4 F. Supp. 947	25
Pope v. U.S., 323 U.S. 1	23
Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F. (2d) 208	25
Saltzman v. Birrell, 156 F. Supp. 538	21

	Page
Societe Internationale v. Rogers, 357 U.S. 197	22
U.S. v. Bausch & Lomb Optical Co., 131 F. (2d) 545, aff'd 320 U.S. 711	25
U.S. v. Borth, 266 F. (2d) 521	26
U.S. v. Bressler, 60 F. Supp. 676, aff'd 160 F. (2d) 403	25
U.S. v. Cochrane, 235 F. (2d) 131, cert. den. 352 U.S. 941	25
U.S. v. Cooper Corp., 42 F. Supp. 317	25
U.S. v. Farina, 153 F. Supp. 819	25
U.S. v. McNinch, 356 U.S. 595	25, 26
U.S. v. Mercur Corp., 83 F. (2d) 178, cert. den. 299 U.S. 576	25
U.S. v. Tieger, 234 F. (2d) 589, cert. den. 352 U.S. 941	25
Wong Yang Sung v. McGrath, 339 U.S. 33	24

STATUTES:

U.S. Constitution, Amendment V	3
31 U.S.C. 231, 233	3

MISCELLANEOUS:

Rule 1, FRCP	23
Rule 37(d), FRCP	10
Rule 55(b)(2)	23
Rule 55(c)	3
Rule 60(b)	3
Moore, Federal Practice, § 12.11	24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

T. Y. EONG, Individually and Trading as ASIA DEVELOPMENT CORPORATION and as HONG KONG SHIPPING CORPORATION, LTD., *Petitioner*

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered February 10, 1962, which affirmed the Judgment entered on February 11, 1959, by the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A) is not yet reported. The opinion of the District Court (R. 221-230) is reported at 182 F. Supp. 446.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 10, 1962 (Appendix B.). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Has petitioner been deprived of his property, in the amount of $516,000.00, in violation of Fifth Amendment due process where:

I. (a) he complies with orders for the production and admission of documents and is willing to complete his deposition immediately where he is (the Government spurning such offer) or in the United States as soon as possible, but is under medical orders not to travel and therefore cannot return to the United States within the required 30 days, and the Court refuses to vacate its default order or the Judgment by default?

(b) an answer has been stricken as a "sanction", is the Court "required", as stated by the Courts below, to accept as true at the trial on damages the "information and belief" allegations of alter ego in the complaint despite the provisions of Rule 55(b)(2) FRCP?

II. Has petitioner been deprived of his liberty, and his property restrained in violation of Fifth Amendment due process where petitioner was jailed under the False Claims Act, bonded in the amount of $50,000, and his right of travel severely restricted, but both Courts below refused to rule on the validity of such asserted violation of the False Claims Act?

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The relevant Constitutional provision involved is the Fifth Amendment to the Constitution of the United States, the relevant statute is the False Claims Act (31 U.S.C. § 231) and the relevant Federal Rules of Civil Procedure are Rules 37(d), 55(b)(2), 55(c), and 60(b). Such materials are set forth in Appendix C hereto.

STATEMENT OF THE CASE

The Contract

On October 10, 1947, the United States Maritime Commission invited sealed bids from citizens and nationals of friendly nations for the purchase of seventeen "vessels immobilized in Subic Bay, Philippine Islands, declared constructive losses for all purposes and determined to be damaged beyond reasonable repair." (R. 24, 39). Bids could be submitted on any or all vessels. A bidder was required to submit satisfactory evidence of responsibility and qualifications to perform the obligations of the contract. Each bid had to be accompanied by an affidavit of nationality and the Maritime Commission reserved the right to reject the bid even after its acceptance by the Maritime Commission should it be determined that the bidder was a national of a country prohibited from engaging in commercial transactions with the United States. 25% of the amount of the bid was required to accompany the bid. The Maritime Commission reserved the right to make any award it may deem most advantageous or will best serve the purposes and policy of the Merchant Marine Act of 1936. (R. 24-29).

The terms of sale provided that: (1) Each of the vessels was offered for sale "as is, where is" at time of

delivery. The bill of sale conveying title in each of the vessels from the Commission to the Buyer fully warranted title and freedom from all liens. (2) The Buyer of each of the vessels assumed all the risks of ownership thereof from the time of receipt of notice of acceptance of bid. (3) The Buyer shall completely scrap, dismember, dismantle, or destroy the hulls or hulks of the vessels, in such manner and to such extent as to prevent their use as a means of transportation except such of the vessels, or hulls or hulks of the vessels, as may be lost at sea or otherwise destroyed. (4) Such scrapping was to be performed within two years from the date of delivery of the first five vessels purchased and with an additional allowance of one month for each additional vessel purchased. (5) The Buyer was obligated to provide the Commission with a duly authenticated certificate by a reputable marine surveyor of a recognized organization engaged in the work of marine surveying that such scrapping had been accomplished. The Buyer, however, was permitted to abandon the vessels if the vessels were unusable as a means of transportation. (6) In the event the Buyer is delayed in moving, scrapping or destroying the vessels and the Commission is satisfied that such delay had been caused by conditions beyond the control of the Buyer or by conditions which by the exercise of reasonable diligence the Buyer was unable to prevent "then the Commission shall, by consent in writing, extend the time" for such scrapping for such period as the Commission shall deem just, reasonable, and proper. (7) The scrapping obligations of the contract were the primary considerations for the sale of the vessels and the failure of timely performance would cause the Commission substantial damage difficult of ascertainment. Consequently, the contract provided a schedule of liqui-

dated damages calling for the sum of $100 per vessel, per day, for a maximum of 180 days, for unexcused delay in scrapping and a lump sum amount of $25,000, per vessel for total default under the contract. Such total default was defined as a failure, neglect or refusal to scrap after the expiration of the aforesaid 180 days. (8) The Buyer was precluded from selling or assigning any of its rights or obligations under the contract without the prior written consent of the Commission and all terms of the contract were binding upon the successors and assigns of the parties. (R. 29-38).

On November 10, 1947, a bid on fifteen of the seventeen wrecked vessels in the amount of $271,000 was submitted to the Maritime Commission by the Asia Development Corporation of Shanghai, China. On February 2, 1948, the Maritime Commission accepted such bid. (R. 43-46). On March 11, 1948, the Maritime Commission executed fifteen bills of sale and transfer orders approving the sale of the vessels to Asia Development Corporation. (R. 447-511).

The Arrest

At 7:00 or 8:00 p.m. on New Year's Eve 1956, T. Y. Fong, a Nationalist Chinese alien, who had been visiting his school children in the United States for several months, was arrested in the presence of his wife and children and jailed by the United States Marshal in San Francisco. In addition to the Deputy United States Marshal executing the warrant, an Assistant United States Attorney was present at the arrest. (R. 49-50, 125, 278). The arrest was publicized through statements to the newspapers by Government spokesmen that Mr. Fong had illegally sold surplus ships to Communist China.

The basis for such arrest was a Complaint sworn to by an attorney for the Department of Justice charging that Asia Development Corporation was the alter ego of Mr. Fong, that the contractually required scrapping certificates submitted to Maritime were false, that the civil False Claims Act had accordingly been violated and praying for damages in the amount of $764,000. (R. 15-23). The Court ordered a bench warrant to issue and fixed bail in the amount of $50,000. (R. 49). The same day, December 31, 1956, the United States moved the Court to increase the bail to $752,000. (R. 46). Such motion was ordered off calendar by the Court. (R. 4). On January 2, 1957, Mr. Fong posted the required bail and was released from jail on the condition that he remain within certain stated court jurisdictions. (R. 51-53). The only authority for the arrest and the imposition of $50,000 bail is § 233 of Title 31, U.S.C.

The allegedly false scrapping certificates described in paragraphs XVIII and XIX of the sworn Complaint (R. 22), on which the Government solely based its charges of violation of the False Claims Act were neither attached to the Complaint or in any manner thereafter presented to the Court by the Government.

Proceedings Prior to Trial

By agreement between the parties, no further pleadings were filed until June 3, 1957. During such period counsel for Petitioner gave the Government copies of every available evidentiary document. (R. 287-288).

On June 3, 1957, counsel for Petitioner filed a Motion to Dismiss the Complaint, in order to test the validity of the asserted violation of the False Claims Act. (R. 4). The Government asked for an extension of time

within which to respond to which counsel for Petitioner agreed. (R. 75-76). The Government filed no opposition to the Motion to Dismiss, but filed an Amended Complaint on July 11, 1957. The Amended Complaint contained four counts: (1) violation of the False Claims Act; (2) violation of the Surplus Property Act; (3) conversion of the vessels sold to Asia Development Corporation; (4) breach of contract for failure to scrap on time. The damages prayed for were: (1) Count I, $1,587,500, doubled plus forfeitures, interest and costs, (2) Count II, double the amount of damages suffered by the United States, plus the sum of $2,000 for each fraudulent act, together with interest and costs, (3) Count III, $1,587,500, togther with interest and costs, (4) Count IV, $645,000, as liquidated damages, together with interest and costs. (R. 55-74).

On July 12, 1957, counsel for Petitioner filed a Motion to Dismiss the First Count of the Amended Complaint, violation of the False Claims Act, together with Points and Authorities in support thereof. (R. 75-81). Attached to the aforesaid Motion to Dismiss were copies of the allegedly false scrapping certificates together with an affidavit by the maker of the scrapping certificates (Captain W. A. Doust) that the statements contained in these certificates are true, that the handwriting on the certificates was his and that his signature was genuine. (R. 81-89).

The Government has never at any time offered any evidence that the aforesaid affidavit of Captain Doust is false or that the original certificates themselves were not true and correct.

A hearing on the Motion to Dismiss the First Count on the Amended Complaint was held on July 18, 1957.

The Government filed no points and authorities in opposition to the Motion prior to argument. The Government merely stated that Mr. Fong was a deceitful and devious person who almost daily lied to the Government and who had been "an active collaborator with the Chinese Communists". (R. 267). The Assitant United States Attorney went so far as to say "I think he (Fong) probably will be getting some plaudits from Mr. Chou En Lai after the true facts are brought out." The Court never did rule on the Motion to Dismiss.

At the hearing on the Motion to Dismiss, counsel for Petitioner, whose deposition was to commence the following day, requested the Court for an Order under Rule 30(b), FRCP, to seal the deposition. The Court was advised that it was necessary to protect Mr. Fong's parents and relatives in China from persecution by the Red Chinese government which might result if Mr. Fong's record of assistance to the United States Navy was publicized. The Government opposed the Motion and the Court denied this Motion. (R. 265-268).

Following the argument on the Motion to Dismiss, July 18, 1957, counsel for Petitioner filed an Answer to the Amended Complaint. The Answer denied liability under each and every of the four counts of the Amended Complaint. (R. 94-97).

On the following day, July 19, 1957, the Government commenced the four day deposition of Mr. Fong. (R. 269-294). The deposition, later characterized by the District Court as being "rough treatment" of Mr. Fong

(R. 320), who was then under medical care for a peptic ulcer and infectious hepatitis (R. 129-130), stressed certain matters not apparently germane to the lawsuit. Mr. Fong was questioned at length concerning his family remaining in Red China, their connections with the Red government, correspondence with his father in Shanghai, financial support to his parents since 1948, and whether he had smuggled funds out of Red China. (R. 128, 269-278). Counsel for the Government threatened perjury proceedings, (R. 281, 128) and stated that the Government planned to apply for an increase in his bond. (R. 282). Presumably the increase in bond to be applied for would be a pressing of the Government's Motion to Increase Bond to $752,000. (R. 46).

The deposition was then recessed. On September 4, 1957, counsel for Petitioner advised the Court and counsel for the Government that Mr. Fong had left the country. (R. 5). On September 12, 1957, the Government filed a Petition requesting that the Court enter an Order requiring Mr. Fong to appear on September 30, 1957, and show cause why additional bond should not be required. (R. 99). The Court entered such an Order that day. (R. 100). On September 30, 1957, counsel for Mr. Fong filed a Return To Order To Show Cause. (R. 101). Such Return brought to the Court's attention the fact that the bond had legal support only if a prima facie violation of the civil False Claims Act had been pleaded, that the Motion to Dismiss the claimed violation of the False Claims Act had been pending for some time and urged the Court to hold in abeyance any action on the bond until the pending Motion To Dismiss had been decided. (R. 101-104). On October 17, 1957, the Gov-

ernment moved the Court for an Order forfeiting bond in the amount of $50,000, and for the issuance of a bench warrant for the re-arrest of Mr. Fong. (R. 108-113). On October 28, 1957, counsel for Mr. Fong filed a memorandum in opposition to the Government's aforesaid Motion. (R. 6). Neither the Motion To Show Cause or To Forfeit Bond have ever been ruled upon by the Court.

On December 4, 1957, the Court filed a Memorandum and Order Reserving Ruling On Motion To Dismiss. (R. 113-118). In its Memorandum the Court said that whether or not a false claim under the statute had been presented was "most doubtful" (R. 117), but that ruling would be reserved until trial.

Almost six months from the recessing of the deposition of Mr. Fong, on January 17, 1958, the Government filed a notice of resuming his deposition. (R. 122-123). Prior to the date set for the resumption of Mr. Fong's deposition, counsel for Petitioner filed a Motion for a Protective Order under Rule 30(b) that his further deposition be taken on written interrogatories. The Court denied the Motion. (R. 323).

On March 10, 1958, the Government filed a Motion for an Order under Rule 37(d), FRCP, striking the Answer and for an Order of Default of Defendant. (R. 130-132). Counsel for Petitioner filed an affidavit (R. 140) which stated that he had received an unsolicited telephone call from Petitioner on March 10, 1958, which represented the first personal contact between counsel and Petitioner since August of 1957. The affidavit set forth that:

> Your affiant is convinced that Mr. Fong's absence is due to his lack of understanding of judicial

processes in the United States and his deep fear of harm based on the menacing attitude and conduct of plaintiff's counsel in causing him to be arrested in a case where the Government only sought money from him, the unwarranted assertions of communist sympathies made about him in open Court, the threats of possible prosecution for perjury made in the course of his deposition, the causing of persistent inquiries to be made about him at his residence in Sao Paulo, Brazil, by the Brazilian police, and that his children, lawfully staying in San Francisco, have been questioned about him after the commencement of the case. (R. 142).

In ruling on the Motion the Court said "Whether or not his fears of some dire inquisitorial restraints being placed on him are well founded or not, are difficult to determine." (R. 323).

On April 22, 1958, counsel for Petitioner filed a Motion to Vacate Default. (R. 145-146). Attached to said Motion was an affidavit of counsel (R. 154-156) stating that he had conferred with Petitioner in Buenos Aires and for the first time Petitioner understood that the failure to complete his deposition might result in the entry of a judgment against him. He also understood for the first time that the U.S. Government, through its hiring of a Brazilian policeman to inquire as to his whereabouts, was not taking a step preliminary to his arrest in Brazil. The affidavit further set forth that Mr. Fong's doctor did not consider him in condition to travel because of a stomach chronical bleeding ulcer. (See also Affidavit of Dr. J. W. Middleton, British Hospital, Buenos Aires, Argentina, R. 153-154).

Also attached to the Motion was a cable by counsel for Petitioner from Buenos Aires, to the attorneys for the Department of Justice in Washington who were in charge of the case. The cable set forth that: (a) Mr. Fong was under medical care and directed not to travel; (b) Mr. Fong for the first time understands effect of default order; (c) Mr. Fong was willing to complete the deposition at the United States Embassy in Buenos Aires at the convenience of the Government and would prepay expenses of Government counsel. (R. 150-151). The Government replied to this offer by stating:

> By reason of the present status of this case on the docket of the Court, Mr. Brookhart's suggestion that defendant's deposition be resumed in Buenos Aires is not acceptable to plaintiff. (R. 152).

At the argument of the Motion the Court held "I don't see that the offer to continue his deposition in Argentina is legally worthy of acceptance" although Government counsel admitted that Petitioner's answer, if proven, was a meritorious defense (R. 342, 333), "the order will be that the motion to set aside the default will be denied without prejudice to its renewal in the event that the defendant returns to the United States and makes himself available for conduct of his deposition within 30 days from date." (April 28, 1958, R. 343).

The Government then filed extensive Requests for Admissions under Rule 36, FRCP. (R. 156-161). Petitioner responded fully to such requests. (R. 200-202).

In response to the order of the Court to produce certain documents or account for them, (R. 344), coun-

sel for Petitioner filed numerous documents, and accounted for others. (R. 163-199, 384). On May 27, 1958, counsel for Petitioner filed a Motion for Reconsideration of the Motion to Vacate the Default Order. (R. 163). Attached to this Motion was an affidavit from Drs. Middleton and Caul, Buenos Aires British Hospital, dated May 20, 1958, that it would be necessary for Mr. Fong to remain in the hospital for some time under careful observation and that he will not be able to travel until he is completely recovered. (R. 195). This Motion was denied. (R. 11).

The Hearing on Damages

On July 7, 1958, the hearing on damages commenced. (R. 345-446). The first witness called by the Government was John F. Harrell, Assistant General Counsel of the Maritime Commission. The witness testified as to certain of his legal opinions regarding the contract and certain federal statutes. (R. 361-365). The Court stated that such testimony lacked any materiality. (Unprinted Tr. 54, 69).

The second and final witness called by the Government was Mr. Benjamin F. Carter, Chief of the Ship Sales Branch of the Maritime Commission. (R. 366). He testified that the first time he met Mr. Fong was approximately three years after the contract had been awarded. The purpose of the visit was to request an extension of time within which to scrap three ships still in Subic Bay. (R. 366). The deadline for scrapping all fifteen ships had passed at the time of the visit. (R. 367). A previous request had been made for an extension of time regarding all fifteen ships. (R. 367). Mr. Carter never asked that liquidated damages be paid. (R. 367, 376).

The witness also testified that a request for an extension of time within which to scrap all ships was never acted upon by Maritime. (R. 376). He also testified that Maritime, State and Navy, conferred over the performance of the contract with regard to the three ships remaining in Subic Bay and that they relied on the Navy's finding that the contract had been performed to the best of the contractor's ability and concurred in the Navy's recommendation for an extension of time within which to scrap the three Subic Bay vessels. (R. 374-377, 381-382). The Navy had been designated as Maritime's representative in the prosecution of the contract. (R. 559). The witness also testified that the contract was "not closed". (R. 376). No damages for breach of contract had been assigned by Maritime for that reason. (R. 375-376). The witness was unaware of a report from the Commander of U.S. Naval Forces, Philippines, to the Commander-in-Chief, Pacific saying that performance under the contract was 100% completed as to the vessels remaining in Subic Bay. (R. 374-375).

Witness Radford

While the Government called no other witness, it offered certain portions of the cross-examination of Admiral Arthur W. Radford as an adverse, hostile witness. (R. 384, 420).

Counsel for Petitioner offered portions of the direct examination of Admiral Radford. He testified that he took command as Commander-in-Chief Pacific on or about April 1, 1949. (R. 392). He learned of the contract between Asia Development Corporation and the Maritime Commission in the fall of 1949 or the Spring of 1950. (R. 392). He came to know Mr. Fong

in late 1950. (R. 399). In 1951 Mr. Fong met with Admiral Radford in Honolulu concerning an extension of time to take certain vessels out of Subic Bay. (R. 399-400). The Admiral was later advised that Maritime had granted the requested extension of time. (R. 400-401). He further testified that he was "on the spot" in Subic Bay, that Mr. Fong came over and Admiral Radford told him exactly what he wanted done to clear up the Bay. Mr. Fong assured him that what was desired would be accomplished. (R. 404). The witness testified that changing developments in the Pacific theater between 1949 and 1954 affected the performance of the contract in that the Communists took Shanghai in April, 1949, which caused Petitioner to flee Shanghai and Asia Development Corporation to abandon its ship scrapping yard. (R. 415-416).

The Court refused to allow the testimony of Admiral Radford concerning his investigation in Hong Kong of rumors that some of the vessels involved in this contract had been sold to Communists. At the Admiral's request the U.S. Counsel General in Hong Kong investigated their files and reported that there was no evidence to support an allegation like that. (R. 417-418).

Admiral Radford testified that the Asia Development Corporation had, in the performance of this and other contracts, materially assisted the United States Navy in the prosecution of its Korean war effort. (R. 401-402, 410, 413-416, 569). The Maritime Commission had designated the Navy as its representative in the prosecution of the contract and this responsibility developed upon, and was personally assumed by, the Navy's area Commander, Admiral Radford. (R. 401, 559). He was intimately familiar with the chaotic wartime

conditions then existing in the Far East and testified as to the difficulties ensuing therefrom in the performance of this contract, and the assistance Mr. Fong rendered the Navy. (R. 401-402, 404-405, 413-416).

Witness Fong

Counsel for Petitioner were permitted to read into the record certain portions of Mr. Fong's deposition. He testified that after the investiture of Shanghai by the Communists and the recognition of the communist regime by the British Government, he feared that communist agents and representatives would be sent to Hong Kong to assert claims to the vessels. Asia Development Corporation had moved ten of the vessels from Shanghai to Hong Kong at great cost and transferred them to a corporation under British registration in order to prevent their falling into communist hands. (R. 423). The capital of Hong Kong Shipping Corporation, the transferee, actually belonged to the various stockholders of Asia Development Corporation. (R. 432). The Government did not contend that the transfers of the vessels from Asia Development Corporation to Hong Kong Shipping Corporation constituted a breach of contract. (R. 438).

Except for the Exhibits introduced during the hearing this concluded the proceeding. Counsel for Petitioner made his closing statement to the Court arguing, inter alia, that conclusions of law in the Complaint are not deemed admitted by the effect of the Order of Default; that the Government must prove its entitlement to damages; that an extension of time as to three ships was granted by Maritime and the ships were scrapped within this period; that as a matter of law damages for delay in scrapping the remaining

vessels were waived by the Government by its refusal to act on the requested extension of time; that liquidated damages under the circumstances amounted to a penalty and were not recoverable as a matter of law and that the Government had completely failed to prove the asserted conclusion of law that Mr. Fong was the alter ego of the contracting party, Asia Development Corporation. (R. 438-439).

Counsel for the Government made no oral closing statement but filed a closing statement a month after the conclusion of the hearing, at the request of the Court. (R. 205-221). The Court had asked counsel for the Government to file a written closing statement to make clear "just exactly what you are asking for." (Unprinted Tr. 216). Concerning liquidated damages the Government's closing statement had this to say:

> The question of what is the proper measure of damages to which plaintiff is entitled by reason of its loss of 13 vessels to which it, and it alone, had absolute title and right of possession *requires a brief discussion of why the liquidated damage provisions of Section IX (F) (3) of the contract between the parties are inapplicable . . .*

It is clear from the dollar amounts asserted by the Government in its closing statement to be the proper measure of damages that liquidated damages were not claimed, as the Court stated at the hearing. (R. 206, 411-412). With regard to alter ego theory (that Mr. Fong is the alter ego of Asia Development Corporation) the Government did not maintain that it had proved this allegation but nevertheless requested judgment to be entered in that fashion. (R. 220-221, 434).

The Order for Judgment

On December 30, 1958, the Court filed its Order For Judgment. (R. 221-230). The Court found: (1) that the allegations of the Complaint are accepted as true as a result of the entry of a default and that therefore the judgment will be entered against Mr. Fong as well as the contracting party, Asia Development Corporation. (R. 221, fn.). (2) that the controlling date for determining the wilfulness of Mr. Fong's failure to appear for the resumption of his deposition was February 27, 1958, the date the Court set for the resumption of the deposition. (R. 222, fn.). (3) that the Government has conceded that it may not have recovery under more than one count of the Amended Complaint. (R. 223). (4) that there is grave doubt that counts one, two and three state a claim upon which relief can be granted. (R. 223). (5) that the posture that the case has now assumed upon the entry of the default makes it unnecessary to rule on the Motion To Dismiss (R. 223, fn.). (6) twelve vessels were not scrapped on time and consequently the Government was entitled to liquidated damages in the amount of $516,000. (R. 226). (7) three vessels were scrapped within the time allowed and consequently liquidated damages were not allowed for them. (R. 226-227). (8) actual damages, the sales price of the vessels, are proper damages for five vessels because the Amended Complaint did not state that they were scrapped. (R. 228-229). The Court also held:

> That such a large judgment is by default is the regrettable consequence of defendant Fong's inexplicable failure to appear and implement his defense. *It may be that a meritorious defense to all or part of plaintiff's claim for breach of contract could have been presented.* But the importance in the administration of justice of effectu-

ating the discovery process of the Court made the entry of the default necessary. (R. 229-230).

Judgment was entered by the Court against Mr. Fong for $516,000 for liquidated damages even though the Government had said that liquidated damages were inapplicable, and $511,000 for actual damages. Despite objections by counsel for Petitioner the Court adopted the Government's proposed findings of fact and conclusions in toto. (R. 230-241).

Post Trial Proceedings

On February 20, 1959, counsel for Petitioner filed a Motion for a New Trial, To Set Aside The Judgment by Default And To Amend The Judgment under Rules 52, 55, 59 and 60, FRCP. (R. 243). The grounds urged on the Motion for a New Trial and to Set Aside The Default were that the failure to resume the deposition was not wilful, that Petitioner, subsequent to the entry of the default and at the time of this Motion, was making a bona fide effort to comply with the Order for resumption of deposition. In support of these contentions there was filed a cable from Mr. Fong, dated February 17, 1959, stating that he will resume his deposition in San Francisco as soon as his doctors will permit, or in Sao Paulo at his expense until he was able to travel, and an affidavit from a Brazilian doctor that he had operated on Mr. Fong, would have to operate on him again, and that Mr. Fong could not now travel. (R. 243-248).

The grounds advanced in support of the Motion To Amend The Judgment were that the Government's claim for liquidated damages had been expressly abandoned, that any award of actual damages was improper since such had not been prayed for in count four of

the Amended Complaint and thus Rule 54(c) precludes their award after default.

On June 3, 1959, the Court issued an Order denying the Motion for a New Trial and to Vacate the Judgment but Conditionally Granting the Motion To Amend the Judgment by deleting the award of actual damages. (R. 249-254). The Court ruled: (1) the default was a "sanction" and proper at the time it was entered and will not be vacated although Mr. Fong offers to come to San Francisco to complete his deposition as soon as his health permits or to prepay the travel expenses for Government counsel to complete the deposition. (2) "If both amendments were made the judgment would in effect be vacated." And the Government had not abandoned its claim for liquidated damages. (3) the Government did not claim actual damages until after entry of default. (4) Rule 54(c) precludes the recovery by default of anything in excess of that prayed for under the fourth count, namely, liquidated damages. (5) the Government, which sought the default, may prefer to have a trial on the merits in which it could pursue its claim for actual damages. Consequently, the Judgment was amended to delete the award of actual damages unless the Government consented to vacation of the default. (R. 249-254).

The Government responded to the Court's Order with a Statement that it "hereby waives claim for actual damages under the amended complaint provided that plaintiff is entitled to final judgment for liquidated damages in the amount of $516,000 in accordance with the judgment of this Court" and does not consent to vacation of the default. (R. 255-256).

The parties thereafter appealed and the Court of Appeals affirmed the judgment in all respects.

ARGUMENT

1(a). The record is clear that petitioner complied with orders for the production and admission of documents (R. 156-161, 163-199, 200-202, 344, 384) and was uncontrovertibly willing to complete his deposition immediately in South America, or, in the United States as soon as his doctors would permit him to travel.

Were the Courts below correct in refusing to allow the deposition to be completed in either way, denying petitioner the right to defend against a complaint for $5,595,000 and approving the entry of a default judgment against petitioner of $516,000 when petitioner was not even a party to the contract in question? Cf. *Domenenacre* v. *Rockwell Mfg. Co.*, 23 FRD 686; *Saltzman* v. *Birrell*, 156 F. Supp. 538.

The Trial Court attempted to justify this action by stating that the importance in the administration of justice of effectuating the discovery process of the Court made the entry of default necessary as a "sanction" and the Court of Appeals approved this action. The Court of Appeals may well have been influenced by its incorrect and prejudiced assumption that petitioner made enormous profits.

There was no evidence tendered by the Government, or otherwise available, that petitioner's illness was not real, that he would not complete the deposition, that he was not afraid of re-arrest or that his failure to obey court orders was wilful. The Court of Appeals seems to suggest that petitioner, regarded as "contumacious" by that Court, was being punished for civil contempt, which would be fundamentally erroneous. *Duell* v. *Duell*, 178 F. (2d) 683.

Petitioner asserts that the constitutional limits of due process do not permit such exercise of the Court's power under these circumstances. This Court approved the striking of an answer and the entry of a default judgment in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 312, because the defendant had completely refused to comply with the Court's orders. The rationale there was that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. That cannot be the case where the government admits petitioner has a meritorious defense (R. 333), petitioner had obeyed discovery orders to the then limit of his ability and demonstrated his willingness to complete the deposition.

This Court has recently noted the constitutional limitations upon the power of courts, even in aid of their own valid processes, to deny a party the opportunity for a hearing on the merits of his cause. *Societe Internationale* v. *Rogers*, 357 U.S. 197.

> These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the *Hammond* case might well falter under such circumstances. Cf. Tot v. United States, 319 U.S. 463. Certainly substantial constitutional questions are provoked by such action. Their gravity is accented in the present case where petitioner, though cast in the role of *plaintiff*, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather petitioner's position is more analogous to that of a *defendant*, * * * *. p. 210.

1(b) The Courts below held that the Trial Court was *required* to accept the allegations of the complaint as true as a result of the entry of default even where the allegations were made only on information and belief. If this be a correct statement of the law then the provisions of Rule 55(b)(2) "If, in order to enable the court to enter judgment . . . or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper . . ." are meaningless. Adherence to the policy of law and procedure as expressed in the Rule was urged on the Court by petitioner's counsel at the hearing on damages. It is particularly appropriate where a substantial judgment is sought through alter ego allegations of domination and control of Asia Development Corporation by Petitioner, which are bare conclusions of law not admitted by default. The holding of the Courts below is in conflict with *Cragin* v. *Lovell*, 109 U.S. 194; *Pope* v. *U.S.*, 323 U.S. 1; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 *U.S.* 683. Cf. *Eastern Industries* v. *Traffic Controls*, 142 F. Supp. 381.

The result of these holdings has been to allow the government to establish liability without proof and to hold petitioner personally liable under a contract to which he was not a party. As a precedent, the holding of the Courts below leaves the defaulting defendant without the protection of a court between himself and the unproven allegations of his opponent. It deprives the Court of the right to ascertain the truth before converting a complaint to a judgment and does violence to the policy of Rule 1, F.R.C.P. Such a punishment of default too far exceeds the "crime" committed by

a defendant. The "sanction" of default imposed herein constituted an unconstitutional denial of all right to defend as a mere punishment. *Hovey* v. *Elliott*, 167 U.S. 409. Such a holding by the Courts below reverts the policy of the law to the time when judicial rigidity forced the birth of courts of equity.

II. The arrest of a person is a strange commencement of a civil action in the United States. This doubtless effective method of commencing the action is available to the Government when it alleges that a violation of the False Claims Act may have occurred. However, there must be a method of testing the statutory basis of such action without awaiting the many months or years before a trial on the merits can be had. Moore, Federal Practice, § 12.11. Otherwise, a judicial refusal to act when the validity of the alleged violation of the False Claims Act is challenged could result in a man's indefinite incarceration or restriction of his liberties. By the terms of the bond imposed herein petitioner was shackled within the confines of three federal court jurisdictions. The right of travel is a liberty protected by the Fifth Amendment. *Kent* v. *Dulles*, 357 U.S. 116. An alien lawfully visiting in the United States is entitled to the protection of our Constitution. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33.

The method of testing the validity of an alleged violation of the False Claims Act is the time honored motion to dismiss. The theory that a man's liberty can be restricted and he deprived of his property by a Court in a civil action, without the right to have the legal propriety of such action determined by the Court is repugnant to our most elemental concepts of justice. "When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps." *Coppedge* v. *U.S.*, — U.S. —, 30 USLW 4303, 4306.

Here, the question was simply whether a certain letter and scrapping certificates constituted a "claim" under the Act. The Government based its case on these items and petitioner contended that these items, which did not ask the Government for money or property, could not legally constitute a claim under the Act. Neither party ever did, or could do anything to alter the legal posture of this aspect of the case. There remained only for the Court to decide as a matter of law whether these documents constituted a "claim" under the Act.

"It is obvious that there are cases which justify and indeed compel the granting of such motion." *Rennie & Laughlin, Inc.* v. *Chrysler Corporation*, 242 F. (2d) 208, 213. Where the civil action depends upon the construction of a criminal statute (*U.S.* v. *McNinch*, 356 U.S. 595) and involves the extraordinary procedure of arrest, bail and restrictions on individual liberty, it should fall within such category of cases. "No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for *prompt, eminently fair* and sober criminal law procedures." *Coppedge* v. *U.S.*, supra.

Other Courts have not hesitated to rule on the pleadings alone under the False Claims Act. *Olson* v. *Melon*, 4 F. Supp. 947; *U.S.* v. *Cooper Corp.*, 42 F. Supp. 317; *Cahill* v. *Curtiss-Wright Corporation*, 57 F. Supp. 614; *U.S.* v. *Bressler*, 60 F. Supp. 676, aff'd 160 F. (2d) 403 (C.A. 2d); *U.S.* v. *Farina*, 153 F. Supp. 819; *U.S.* v. *Mercur Corp.*, 83 F. (2d) 178 (C.A. 2d), cert. den. 299 U.S. 576; *U.S.* v. *Bausch & Lomb Optical Co.*, 131 F. (2d) 545 (C.A. 2d); aff'd 320 U.S. 711; *U.S.* v. *Tieger*, 234 F. (2d) 589 (C.A. 3rd), cert. den. 352 U.S. 941; *U.S.* v. *Cochrane*, 235 F. (2d) 131 (C.A. 5th), cert.

den. 352 U.S. 941; *U.S.* v. *Borth*, 266 F. (2d) 521 (C.A. 10th); *U.S.* v. *McNinch*, 356 U.S. 595.

The Court's refusal to ever rule on the motion to dismiss violated petitioner's Constitutional right not to be jailed, deprived of his property and liberty without due process of law. It is a denial of due process to use the "sanction" of default to bar a challenge to Governmental action which restricts property and liberty, as the courts below did. (R. 223, fn.).

CONCLUSION

By the actions of the Courts below petitioner has been deprived of Fifth Amendment due process at the time when, and because, he was unable to help himself and complete his deposition on the impossible terms set by the Court below. The Government is entitled to the completion of petitioner's deposition, which has always been available to it, and petitioner in turn is entitled to his day in court. "In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of wilful default." *Gill* v. *Stoloff*, 240 F. (2d) 669, 670.

The actions of the courts below denied petitioner Fifth Amendment due process and have unmercifully punished petitioner for matters beyond his control. For the foregoing reasons, this petition for a writ of certiorari should be granted.

SMITH W. BROOKHART
RALPH E. BECKER
BENJAMIN H. DORSEY
F. MURRAY CALLAHAN
Attorneys for Petitioner

May, 1962

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

T. Y. Fong, individually and trading as Asia Development Corporation and as Hong Kong Shipping Corporation, Limited,

Appellant,

vs.

United States of America,

Appellee.

No. 16,594

Feb. 10, 1962

United States of America,

Appellant,

vs.

T. Y. Fong, individually and trading as Asia Development Corporation and as Hong Kong Shipping Corporation, Limited,

Appellee.

Appeals from the United States District Court for the Northern District of California, Southern Division

---

Before: CHAMBERS and HAMLEY, Circuit Judges, and BOWEN, District Judge

BOWEN, District Judge:

This appeal brings before us issues of fact and law related to a certain ship sales and scrapping contract of February 2, 1948 between plaintiff's agent, the United States Maritime Commission, and the defendant, T. Y. Fong, involving 15 of the plaintiff's immobilized merchant vessels lying in Subic Bay in the Philippines on the date of the contract. Herein the parties will be

called plaintiff and defendant, respectively, as they were in the Trial Court.

The United States of America as plaintiff brought this action by the filing of its original complaint in the Trial Court on December 31, 1956, and later filed an amended complaint.

Plaintiff's amended complaint alleging violations of law and of contract set out four separate counts or causes of action: (1) for violation of the False Claims Act (31 U.S.C. §§231, 232), (2) for violation of the Surplus Property Act of 1944 (58 Stat. 765; 50 U.S.C. App. 1946 ed. §1611 et seq.), (3) for conversion of the vessels, and (4) for breach of contract of February 2, 1948. That amended complaint followed defendant Fong's motion to dismiss plaintiff's original complaint based on only the substance of the foregoing first count of plaintiff's amended complaint. Fong renewed his motion to dismiss as against the first count of the amended complaint, and after the Trial Court postponed ruling on his motion and required his answer, defendant Fong answered with denials and alleged affirmative defenses against the several counts of the amended complaint.

Immediately upon filing the original complaint for only alleged violation of the False Claims Act, plaintiff on December 31, 1956 caused the defendant to be arrested and held to bail as provided in the Act upon the ground that defendant, a non-resident, was temporarily in this country and planned to flee the United States. Defendant on January 2, 1957 posted a $50,000.00 bond as required by the Court conditioned that he would appear at all depositions, hearings and proceedings as ordered by the Court, that he would remain within stated court jurisdictions including that of the Trial Court unless permitted by court order to leave, and that the bond would be security for defendant's obligation to pay "any judgment, including interest and costs, which may be entered against me and in favor of the United States", and that the court-deposited security for the bond "is to be applied to payment of any such judgment, interest and costs".

No further court action occurred until June 3, 1957 when defendant filed his motion to dismiss plaintiff's original complaint. Hearing on that motion was set for July 1, 1957, but by stipulation of the parties the hearing was continued to July 15, 1957.

However, on July 11, 1957, plaintiff filed the amended complaint above mentioned. The next day, July 12th, defendant filed its motion to dismiss the first count or cause of action of the amended complaint. This motion was heard on July 18, 1957, when the Trial Court required the filing of briefs, ordered defendant to answer the other counts by August 2, 1957, and continued the further hearing on the motion to August 13, 1957, when it was finally submitted for decision. On December 4, 1957, the Court stating its reasons in a written decision reserved ruling on the dismissal motion until the trial. Some of the reasons and conclusions stated in that decision are in substance now set forth here.

Count one of the amended complaint alleges that defendant violated the False Claims Act, 31 U.S.C. §231, and plaintiff asks for the money relief in forfeitures and double damages provided by the statute.

The False Claims Act provides that "Any person • • • who shall make or cause to be made, • • • for payment or approval, • • • any claim upon or against the Government of the United States, • • • knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, • • • any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement • • • shall forfeit and pay to the United States • • • $2000 and double the amount of damages resulting to the United States from the doing of such act.

As facts constituting a violation of the False Claims Act, plaintiff alleges that 15 of its immobilized vessels in Subic Bay, Philippine Islands were advertised for sale to be scrapped, and that defendant purchased those vessels by the contract dated February 2, 1948 for $271,000.00, and in the contract agreed to scrap five of the vessels by March 3, 1950 and each of the ten remaining vessels at one month intervals thereafter. The defendant by letter of May 2, 1951, several months after the agreed date for scrapping the last one of the vessels, requested a time extension for scrapping three of the vessels on which he stated scrapping had not then commenced, but stated further that of

the other twelve vessels three had been completely scrapped, the scrapping was progressing on seven, that two had apparently been lost at sea, and that he had not parted with ownership of any of the vessels.

Plaintiff, however, alleges that as to the seven vessels on which defendant stated scrapping had begun, although defendant after May 2, 1951 presented certificates of the scrapping completion of four of them by March 16, 1951 and of three of them by May 16, 1951, those vessels were not scrapped by the time of the certified dates, even though they were ultimately scrapped. Plaintiff contends that the allegedly false statements in defendant's May 2, 1951 letter and in the scrapping certificates were for the purpose of obtaining approval of defendant's implied claim of right to retain title to the vessels in opposition to the contractual right of the United States to require reconveyance of the vessels for defendant's breach of the sales and scrapping contract conditions. Plaintiff urges that by those allegedly false statements defendant intended to conceal his breaches of the contract conditions entitling plaintiff to such reconveyance, and that the false statements were in effect made to obtain approval of a claim against the United States.

The Trial Court thought that what plaintiff thus contends to be a "claim against the United States" was not an ordinary one of that kind, that whether it is in fact such a claim as that dealt with in the False Claims Act was left doubtful when judged from the pleadings alone, and that appraisal evidence of the rights and duties of the parties under the sales and scrapping contract and of their dealings with each other subsequent to making the contract was needed to throw light on the nature of plaintiff's contentions, that the trial on the three other counts of the amended complaint would require most of the evidence material to the first count under the False Claims Act, and that under those circumstances, the Court should and did reserve ruling on defendant's motion to dismiss the first count until the trial. The Trial Court properly exercised its discretion in so reserving its decision. Rule 12(d), F.R.C.P.; Montgomery Ward & Co. v. Schumacher, 3 F.R.D. 368; Blue Mountain Constr. Co. v. Werner, 270 F.2d 305 (9 Cir.); United States v. Central States Theatre Corp., 159 F. Supp. 552.

In its order for judgment filed December 30, 1958, after the trial on the merits, the Trial Court again and finally ruled respecting defendant's motion to dismiss count one that "The Government has conceded that it may not have a multiple recovery of damages under more than one count of the complaint, and seeks only an alternative judgment under each of the four counts. In the opinion of the Court, there is grave doubt that counts one, two and three state a claim on which relief can be granted. Under the circumstances, it is proper that damages be awarded only upon plaintiff's claim for breach of contract." That is what the Court did. It did not allow to plaintiff any relief whatsoever respecting counts one, two and three. In that connection in a footnote to its order for judgment the Court stated that "The posture that this cause has now assumed upon the entry of defendant's default has made it unnecessary to rule on the motion to dismiss", and the Court never did. The mere fact that the bond with its security was filed as an incident to the count one proceedings did not deprive the Court of its authority to reserve ruling on the motion to dismiss that count. If it had that authority, as it did in this case, it also had the authority to retain its power over the bond and its security until the motion to dismiss was disposed of. There was no error in the Court's reserving its decision until the trial nor in its failure to ultimately rule on defendant's motion to dismiss count one.

The most important issue in this case is whether the answer-striking and default order against defendant was proper. In the course of pre-trial proceedings, the Court ordered that defendant's answer be stricken and entered default against defendant, as to which the pertinent facts are as follows:

Pursuant to notice given on July 11, 1957, defendant's deposition upon oral interrogatories was begun on July 19, 1957, but on July 23, 1957, not being then completed, it was by agreement of the parties recessed, to be resumed on ten days notice.

Defendant failed to personally appear and show cause as ordered at a hearing on September 30, 1957 why the security for his January 2, 1957 appearance and judgment-payment bond should not be adequately increased and why he should not be recommitted and held in custody until he posted such increased

bond, but his attorney in a written return to the show cause order informed the Court that the defendant had fled the United States, and that his attorney had without success tried as the Court directed to send copies of the show cause order to the defendant by mail addressed to him in care of relatives or friends at places in the United States and Canada. In that return defendant's attorney further said that "It appears that the defendant has breached the conditions of the bond which require him to remain within certain enumerated judicial districts within the United States and to appear before this Court in accordance with all notices and orders of this Court. Under present circumstances, it would appear obvious that defendant will not and cannot be compelled to deposit any additional security and that therefore, plaintiff is asking the Court to do a meaningless act when it asks that the bond be increased." The Court did not increase the bond or its security.

Plaintiff gave notice to the defendant's counsel that the defendant's deposition would be resumed on February 17, 1958. The defendant did not then appear, and the Court continued such deposition taking to February 27, 1958, but the defendant did not personally appear as required on the latter date, nor did he personally ever appear on any other date subsequent to July 23, 1957.

On February 26, 1958, defendant's counsel notified plaintiff's counsel that defendant would on February 27, 1958, move for a protective order directing that the further deposition of defendant be taken on written interrogatories, attaching to the motion a copy of a cable from defendant then at Santiago, Chile, to his attorneys in Washington, D.C. informing them that he would answer written interrogatories in Montevideo, Uruguay, where he would be staying at the Victoria Plaza Hotel, and also attaching to that motion a statement of defendant's San Francisco doctor to the effect that the doctor had treated defendant as his patient from June 17 to July 11, 1957 for a peptic ulcer and infectious hepatitis and had advised for defendant a program of rest. Obviously the Trial Court was convinced beyond any doubt from defendant's cable and other circumstances in the case that he had received the information as to the resumption of his deposition, was willfully refusing to appear for that purpose, was

willfully absent from the district of the forum in violation of his appearance bond and the Court's order, and was while in willful disobedience of the notice and the Court's orders making a presumptuous suggestion of substituting written interrogatories in South America for oral interrogation at San Francisco. The Trial Court denied that motion, and we agree with and approve such denial.

The plaintiff on March 7, 1958 gave notice that it would on March 13, 1958 pursuant to Rule 37(d) F.R.C.P. move for an order striking the defendant's answer in the case and for an order of default against the defendant, accompanying the motion with the supporting affidavits of James B. Schnake and Katherine H. Johnson, two of plaintiff's attorneys, and the affidavit of Culver E. Gidden, disclosing to the Court that the defendant Fong had left the United States between August 17 and 20, 1957, from a place near Boston, Massachusetts, and had traveled by air to Europe via Montreal, Canada, that on the 26th day of November, 1957, the date of Mr. Gidden's affidavit, the defendant Fong was to have been in Paris, France, and that his wife in Sao Paulo, Brazil, then expected him to arrive there soon.

The defendant's counsel, Smith W. Brookhart, stated in his own affidavit that on the night of March 10, 1958 when Mr. Fong was in Buenos Aires, Argentina, affiant had a telephone conversation with the defendant Fong and reminded him that plaintiff's motion for default judgment would be heard by the Court on March 13, 1958, and that there was nothing before the Court to show that his absence from the resumption of his deposition was not willful, and that the defendant then stated his fear that if he returned to the United States he would be rearrested and a larger bond would be exacted from him with the possibility of his having to remain in jail in the United States; that defendant requested the affiant, his attorney, to come to Buenos Aires as soon as possible to go over developments in his case which affiant agreed to do but had not on the date of the affidavit done.

From the foregoing and other record information before it, the Court, on March 13, 1958, found that the deposition of defendant when recessed on July 23, 1957 to be resumed on ten days notice was not then completed; that defendant's attorneys were served

on January 11, 1958 with notice of the resumption of defendant's deposition upon oral interrogatories commencing February 17, 1958 at a specified address in San Francisco; that defendant did not appear at that time and place, but that defendant's attorney was then present in open court when the Court continued the resumption of defendant's deposition from February 17 to February 27, 1958; and that defendant after having been served with proper notice willfully failed to appear before the officer who was to take his resumed deposition upon the latter date at the appointed time and place.

The Court, in view of those facts and pursuant to Rule 37(d), F.R.C.P., ordered that defendant's answer to the amended complaint be stricken from the record in the case, and entered default against the defendant on March 13, 1958 (filed March 14, 1958), reserving to defendant the right to move "upon a proper showing" for the vacation of the default. In that order the Court further directed that the trial limited to the issue of damages be set for May 26, 1958, but apparently due to the interposition of pre-trial motions the Court later continued the trial to June 9, 1958 and again to July 7, 1958, at which time both parties were privileged to offer evidence on that issue.

On April 22, 1958, defendant gave notice that he would move to vacate and set aside the default and the answer-striking order, pursuant to Rule 55(c), F.R.C.P., for reasons set out in a number of affidavits including those stating the need for surgical and medical treatment of defendant in South America and reiterating defendant's fear of further proceedings in San Francisco and his counterproposal that his deposition be resumed and taken in South America at his expense. This motion heard on April 28, 1958 was denied without prejudice to the right of defendant to renew the motion "if defendant returns to the United States of America and makes himself available for depositions within 30 days", but he never did that.

On June 25, 1958, defendant moved for reconsideration of his motion to vacate the default, and again that motion to vacate default was heard and denied on July 2, 1958.

Thereafter the case proceeded to trial on July 7 and 8, 1958 before the Court without a jury upon only the issue of damages.

Counsel for both parties were present and participated in the trial proceedings. Plaintiff submitted as evidence the well pleaded facts alleged in plaintiff's amended complaint and also additional evidence and exhibits. On July 8, 1958 the reception of evidence was completed and the Court then ordered the filing of briefs by counsel and continued the case to September 9, 1958 for submission, when it was finally submitted for the Court's decision.

Having heard and considered the plaintiff's well pleaded facts in view of defendant's default and the striking of his answer, the additional evidence and exhibits and the briefs and arguments of counsel, the Court on December 30, 1958 entered its order for judgment for plaintiff on only the fourth cause of action of plaintiff's amended complaint in the sums of $516,000.00 liquidated damages and $511,000.00 actual damages, total $1,027,000.00. No recovery was allowed on the first, second and third causes of action of plaintiff's amended complaint because plaintiff, the Court ruled, had disavowed its intention of multiple recovery upon the several counts, but had pleaded them only in the alternative, and the Court doubted that either of the first, second and third counts stated a cause of action.

On February 11, 1959, the Court's findings, conclusions and judgment for plaintiff for the above stated amounts, and for plaintiff's costs of $340.40, were entered.

Defendant timely moved for a new trial and for an order setting aside the default and reinstating defendant's answer, and in the alternative for correction of the judgment to eliminate recovery of actual damages because plaintiff had not before the default prayed for actual damages in the fourth count on which the Court had granted recovery for such actual damages.

The Court denied the motion to set aside the answer, striking and default order, and denied the motion for new trial, but, ruling that the award of actual damages to plaintiff on its fourth count in which it did not before the default demand actual damages was prohibited by Rule 54(c), F.R.C.P., the Court by its order of June 3, 1959 ordered "that its judgment of February 11, 1959 be amended to delete the award of actual damages unless plaintiff within 30 days consents to vacation of the default, in

which case defendant's default shall be vacated." That left the award of liquidated damages stand unless the plaintiff accepted the condition that the default be vacated, which condition plaintiff by written statement filed in the case July 2, 1959 expressly refused to accept.

Meantime, pursuant to the Trial Court's order of February 25, 1959 (by a Judge other than the Trial Judge), plaintiff had had execution against defendant's $50,000 appearance bond and its security, and a like sum realized from that execution had been paid to the Treasurer of the United States in partial satisfaction of the judgment.

Both of the parties now appeal to this Court from those parts of the judgment and orders of the Trial Court adverse to them respectively. The Trial Court under Sections 231 and 232 of Title 31 U.S.C., Section 1345 of Title 28 U.S.C., and Section 1635 of Title 50, U.S.C. App. 1946 ed. had, and this Court under Section 1291 of Title 28 U.S.C. has, jurisdiction.

On his appeal defendant assigns six errors as follows:

1. Trial Court's refusal ever to rule on defendant's motion to dismiss the First Count was prejudicial error, because authority to arrest and continue holding defendant to bail existed solely by virtue of First Count.

2. Court abused its discretion in denying the motions to vacate default because of the allegedly uncontradicted showing that defendant's absence was not willful, defendant offered to comply with further discovery procedures within his physical limitations at his expense, and such action would not prejudice or inconvenience plaintiff.

3. The Court erred in holding defendant personally liable for liquidated damages solely in consequence of the default despite his claimed complete legal defense, and because of plaintiff's failure to prove alter ego relationship betwen defendant Fong and Asia Development Corporation and Hong Kong Shipping Corporation, Limited.

4. The Court abused its discretion, in denying defendant's motion to vacate the judgment by default and for a new trial, because of plaintiff's waiver of damages, defendant's meritorious defense, and the final willingness of defendant to comply with

court discovery procedures, and further because, considering the large sums involved and defendant's unfamiliarity with American legal procedures, the equities and furtherance of justice warranted a trial on the merits.

5. Plaintiff is precluded from appealing the Trial Court's deletion from the judgment of award of actual damages to plaintiff because plaintiff refused to accept Court's offer to allow plaintiff to prove actual damages and because plaintiff waived its claim to such damages.

6. Ex parte execution on defendant's bond was wrongfully obtained by misrepresentation of plaintiff's counsel.

In view of what we have already said above, defendant's first assignment of error is rejected.

We now consider defendant's second and fourth assignments of error respecting the Trial Court's order striking his answer and entering his default. The prominent pertinent facts are related above. After plaintiff had moved to resume defendant's deposition, defendant made a motion (denied by the Court) for a protective order that his further deposition be taken upon written interrogatories, attaching to his motion his own cable (dated February 25, 1958, two days before scheduled resumption of his deposition) from Santiago, Chile, and attaching his San Francisco doctor's affidavit that he had treated defendant in June and July, 1957 for peptic ulcer and infectious hepatitis and had prescribed for him a program of rest and recommended his activities be confined to his home as far as possible. That was the first time defendant had mentioned his bad health problems to the Court.

At several pre-trial appearances in the Trial Court, defendant's attorneys emphasized his asserted bad health and his unfamiliarity with and fear of past and prospective American court proceedings in his case, and thereby tried to show that his absence from the scheduled resumption of his deposition and from the hearing on plaintiff's motion for an order striking defendant's answer and entering his default was not wilful and was justified. The Court, however, was rightly unimpressed by that showing including his own and his doctors' statements as to his health. It is very significant that in defendant's cable of February 25,

1958, two days before the hearing on his motion for protective order, he did not say he was sick in Chile where he then was, nor that he would be in bad health in Uruguay where he would be before the end of that February. He did not at any time explain or attempt to explain the nature or extent of his activities during his Canadian, European and South American trips. Neither did he at any time say why his health would not for so long a time permit his return to San Francisco for further proceedings in his case at the very time when he was able enough to and did go on a foreign trip of about seven months duration. Right up to only a few days immediately before entry of the default he was not too sick to personally continue his both-sides-of-the-world business or other activities.

Upon the whole record, and because of defendant's obvious disregard of the Court's notices and orders, his extensive foreign travels and his conduct in fleeing the United States and in unjustifiably failing and refusing to return for more than seven months before entry of the answer-striking and default order pursuant to plaintiff's motion hearing attended and participated in by defendant's attorneys after notice to them, the Court found that defendant willfully failed, after proper notice, to appear for the resumption of his uncompleted deposition. Accordingly, the Court entered the answer-striking and default order against defendant without prejudice to his right to later move "upon a proper showing" for the vacation of the default order.

We have carefully reviewed those statements as to defendant's health and the further record in the case. Therefrom it appears that defendant did not heed or treat seriously his San Francisco doctor's suggestion of a program of rest and of limiting his activities to his home as treatment for defendant's "peptic ulcer and infectious hepatitis". Instead, he traveled across the United States from San Francisco to the Boston area and from there, in violation of the Court's order not to leave certain stated jurisdictions, he went on a very extensive foreign trip via Montreal, Canada, to Europe and thence to four different nations on the west and east sides of South America.

Defendant was an astute business man and made enormous profits in the wrongful sales of the fifteen vessels here involved.

His asserted unfamiliarity with and fear of American court proceedings are not factually or legally justifiable excuses for his refusal to submit to the Trial Court's orders and authority. If that were not so, no litigant who merely feared the outcome of his lawsuit would be required against his own will to submit or continue to submit to any court's authority. Every litigant is bound to submit to the court's lawful jurisdiction.

Defendant was represented by able American counsel whose advice was available to him and was on one critical occasion received by him during defendant's long distance telephone call on March 10, 1958 from Argentina to his attorney in Washington, D.C. who then on the basis of the then existing record advised defendant of the likely unfavorable consequences to him of the default motion then set for hearing on March 13, 1958, when it was heard and granted. Undoubtedly his previous personal knowledge of that default hearing had prompted that telephone call to his attorney who at the March 13th default hearing reported to the Court the subject of that call. The Trial Court was amply justified in disbelieving defendant's excuses because obviously they were not made in good faith and were not trustworthy. In fact, the whole course of defendant's conduct conclusively shows his long sustained willful disregard of the Trial Court's orders and his contumacious attitude towards the Court's authority.

After entry of judgment in plaintiff's favor pursuant to the trial on the merits on the single issue of damages, the defendant moved for a new trial and with that again asked the Court to set aside the default and reinstate his answer. Both of those requests the Court finally refused for the reasons that "no new circumstances are advanced by defendant which in any way indicate that the order of default was not justified at the time it was entered. Although defendant now • • • • represents that he is willing to appear in San Francisco to resume his deposition when his health permits, he has made no showing whatsoever of a meritorious defense which might warrant the exercise of the Court's discretion to set aside the default."

The record in this case strongly supports and justifies the action of the Trial Court in striking defendant's answer and

entering his default, as being clearly within the proper exercise of the Court's discretion. Defendant's assigned errors numbered 2 and 4, as well as his contentions and objections, respecting the answer-striking and default order are without merit and are all rejected. Upon the facts in this case, that order was specifically authorized by Rule 37(d), F.R.C.P., and has the support of authoritative writings and Court decisions. 6 Moore's Federal Practice, Par. 55.10[2], 2 ed., p. 1833; Jackson v. Heiser, 111 F.2d 310 (9 Cir.); Bourgeois v. El Paso Natural Gas Co., 257 F.2d 807 (2 Cir.); Massa v. Jiffy Products Co., 240 F.2d 702 (9 Cir.).

We affirm the Court's rulings as to all things related to the default.

Defendant's assigned error 3 is based on defendant's objections to the Trial Court's holding him personally liable for acts alleged in plaintiff's amended complaint as an incident of the order striking his answer and entering his default, and particularly to the Trial Court's finding of an alter ego relation between defendant and each of Asia Development Corporation and Hong Kong Shipping Corporation, Limited, as the result of only the amended complaint's allegation of such relation plus the answer-striking and default order, without any supporting evidence.

On that issue our attention is called by plaintiff to the former decision of this Court in Edwards v. United States, 123 F.2d 465 (9 Cir.), which held that, in a criminal proceeding, the mere allegation in effect that one is the alter ego of a corporation is not sufficient to advise the accused of the dominance by and merger of the corporation into an individual. Here in this case, however, the facts of the alter ego relation are much more specifically and adequately set out in plaintiff's amended complaint than they were in the Edwards case, supra. The Trial Court was as a result of the default required at the trial on the issue of damages to accept as true the plaintiff's allegations in substance that the Asia Development Corporation and Hong Kong Shipping Corporation, Limited, were under the complete domination and control of defendant Fong and were merely conduits through which he carried on his individual business. The facts so stated were in plaintiff's amended complaint well pleaded, and in

view of the answer-striking and default order, no further supporting evidence was required. That is true even though plaintiff's factual allegations were upon information and belief because they stated facts primarily within defendant's knowledge. 71 C.J.S. 196, § 82. Defendant's assigned error 3 is not well taken and is overruled.

The defendant's assigned error number 5 respecting the right of plaintiff to appeal from the Trial Court's disallowance of plaintiff's claim for actual damages under its fourth cause of action is disposed of by our disposition below of plaintiff's related assignment of error on its appeal.

Defendant claims as his 6th assigned error the Trial Court's levying execution on defendant's bond and its security, and contends that such action by that Court was wrongfully obtained by misrepresentation by plaintiff's counsel in that after defendant's appeal, plaintiff's counsel represented to the Court that plaintiff then had the right to execution against the bond, but that, defendant argues, plaintiff had no such right because the bond was required and posted only as an incident to the proceedings on the first cause of action under the False Claims Act, and that since the Court awarded to plaintiff no relief on that count, the plaintiff has had no right to any benefits under the bond.

After stating that as conditions of the bond, defendant was to appear in Court "• • • in accordance with all notices and with all orders of the Court • •" and that he would "• • remain within the jurisdiction of the United States District Court for the Northern District of California, or for the Southern District of California, or for the District of Columbia, or for all other districts in the State of New York, • • • unless permission to leave • • • be granted by order of the Court • • •", the bond is further conditioned that "I am to pay any judgment, including interest and costs, which may be entered against me and in favor of the United States", and that "• • if I fail to perform any one of these conditions, payment of the amount of the bond shall be due forthwith", and further "• • the security deposited herein is to be applied to payment of any such said judgment, interest and costs, and I consent to the application of said cash bail (later replaced by Government bonds) of Fifty Thousand Dollars

in partial satisfaction of any such judgment as may be entered against me." Parenthesis added.

We think plaintiff correctly contends that the quoted provisions of the bond show explicit intention on the part of both the Trial Court and the defendant that the bond and its security shall cover any judgment of the Court against the defendant whether on the first cause of action or not. Moreover, plaintiff in order to enforce its judgment in this case, in like manner as in any other case, had the right irrespective of the bond provisions to levy execution on any property of the defendant, including the bond's security, found within the Court's jurisdiction. Rule 62(a), F.R.C.P., prohibits execution for 10 days after entry of judgment, but does not provide that pendency of an appeal of itself supersedes the judgment. Nor did defendant's post-judgment motions supersede the judgment. He has taken no action before or since he appealed to supersede the judgment, nor since the issuance of execution has he applied for the Trial Court's correction of an allegedly wrongful order. We think plaintiff's and the Trial Court's action in levying execution on the defendant's bond and its security were proper, and that there is no merit in defendant's 6th assigned error.

On its cross-appeal the plaintiff assigns as error the action of the Trial Court (1) to the extent that its final judgment of February 11, 1959 is in favor of the defendant and against the plaintiff, and (2) in entering the amending order of June 3, 1959 deleting the $511,000.00 item for actual damages from the original judgment of February 11, 1959 in plaintiff's favor, effective 30 days after June 3, 1959, and (3) in conditionally granting on June 3, 1959 the motion to amend the judgment effective 30 days thereafter.

Again here in connection with plaintiff's assigned errors and its claim for liquidated and actual damages, the following provisions of the contract should be noted.

Section IX(F)3 of the contract provided that the primary consideration for the sale of the vessels was the scrapping of them, as to which time was made of the essence, and that defendant should scrap five of the vessels by March 3, 1950 and each of the remaining ten vessels at one month intervals thereafter. De-

fendant agreed that if the vessels were not so scrapped he would for each unscrapped vessel pay as liquidated damages $100.00 per day for each day's delay for 180 days following the specified scrapping completion date and for continued failure to scrap thereafter defendant agreed to be deemed in total default and to pay an additional lump sum of $25,000.00.

Section IX(F)4 of the contract stipulated that the Maritime Commission might terminate it as to further performance in case of delay in scrapping beyond the 180-day period or in case the defendant should operate or permit the operation of any of the vessels (except upon conditions not here involved). It was also agreed that upon such termination, defendant would thereupon surrender the vessels or any parts of them not scrapped and furnish to the Commission a bill of sale with warranty of title free from liens, and that such termination would not release defendant from payment of the above mentioned liquidated damages.

Section IX(H) of the same contract provided that defendant would not sell or assign any of his rights or obligations under the contract without the written consent of the Commission. For violation of this Section, however, the contract did not provide liquidated damages.

Defendant took delivery of all of the fifteen vessels at Subic Bay on March 3, 1948. Twelve of them were towed to Shanghai for scrapping, but before that was completed, the defendant removed ten of those twelve to Hong Kong while Communist forces were advancing upon Shanghai, leaving two of those twelve vessels at Shanghai where they had been grounded. Three of those ten vessels removed to Hong Kong were sold unscrapped for $210,000.00. One of those three so sold was returned by the vendee to Shanghai and while two of those three were being towed back to Shanghai by the vendee those two were intercepted by a Communist gunboat. Plaintiff's complaint alleges that one of those two intercepted vessels was ultimately scrapped on March 3, 1952, but the Court was not informed as to the final fate of the other one of those two intercepted vessels. Of the remaining seven of those ten vessels so removed to Hong Kong four were sold unscrapped by defendant in the period November 15, 1950-February 28, 1951, but those four were ultimately

scrapped in Hong Kong during 1951. However, the contract time limit for the last vessel scrapping was January 3, 1951. The remaining three of those seven vessels so removed to Hong Kong were sold unscrapped in January, 1951 and towed by their vendees to Canton, China. The record does not disclose the scrapping of these three vessels at any time. There was no scrapping time extension for any of said twelve vessels.

The 181st day after the expiration of the contract scrapping time limit for the first five vessels was August 31, 1950; for the sixth vessel, October 1, 1950; for the seventh, October 31, 1950; for the eighth, December 1, 1950; for the ninth, December 31, 1950; for the tenth, January 31, 1951; for the eleventh, March 3, 1951; and for the twelfth vessel was April 2, 1951.

The record discloses that those twelve vessels above mentioned were not scrapped by defendant or for his account within the contract time limits. As to each and all of those vessels, it is not so shown that within that time or the next 181 days thereafter they were scrapped by anyone, and plaintiff asserts as a fact, not denied by defendant, that they were not so scrapped. Upon the substance of the foregoing situation, the Trial Court ruled that "Consequently it is clear that plaintiff is entitled to the full liquidated damages provided by the contract for the delay in scrapping these twelve vessels. These damages total $516,000.00 * * * computed on the agreed basis of $100.00 per day for each vessel for each day's scrapping delay up to 180 days following expiration of the contract time limit, with an additional flat sum of $25,000.00 per vessel for further delay beyond the 180 days).

The Trial Court included that total sum in its judgment in favor of plaintiff, and finally, upon defendant's motion for new trial or for correction of the original judgment of February 11, 1959, rejected defendant's contention in his fourth error assignment that before the entry of that judgment plaintiff waived its claim for liquidated damages, and held that plaintiff had not waived that claim, saying that "* * an examination of the trial record and the arguments and briefs of counsel as a whole shows beyond question that the claim for liquidated damages was not abandoned." From that action of the Court defendant now appeals, but our review of the record convinces us of the correctness of that quoted statement and of the cognate ruling of the Court,

and we approve and affirm that action of the Trial Court and its award of said $516,000.00 as liquidated damages.

Of the original 15 vessels, the three remaining at Subic Bay after the above mentioned twelve had been removed were towed to Japan by defendant in 1953 and there sold by him unscrapped with the understanding, however, that they were to be scrapped, and they were there actually scrapped by defendant's vendees in 1953, within the contract time limit as extended by the Maritime Commission. At the trial plaintiff claimed liquidated damages from defendant as to these three vessels on the theory that defendant in selling them unscrapped had made it impossible for him to scrap them and had thereby failed and refused to scrap the vessels himself or to have them scrapped for his account within the specified time. The Court, although agreeing with plaintiff's contention that defendant's sale of the vessels resulted in defendant's failure and refusal to scrap them within the agreed time limit, held nevertheless that, since those three vessels were ultimately scrapped by the vendees within the contract time limit as extended, plaintiff had suffered no liquidated damages respecting them. Hence the Court refused to allow plaintiff's requested award for liquidated damages as to those three vessels. We agree with that conclusion, and to the extent that plaintiff's first assigned error may apply to it, we hold that such error assignment is without merit.

As to actual damages, the Trial Court ruled that five of the 13 vessels sold by defendant unscrapped have never been scrapped, and that plaintiff would be entitled under the agreed IX(F)4 provision to terminate the contract and repossess these vessels, but that since defendant's wrongful sale of the vessels made that impossible, plaintiff has thereby been actually damaged to the extent of the value of these five vessels, and found that such value based on the sales price of them received by the defendant totals $511,000.00, for which sum as actual damages in addition to that awarded for liquidated damages the Trial Court on the fourth count awarded judgment to plaintiff in the Court's original judgment of February 11, 1959.

As before stated, the Court, however, subsequently on June 3, 1959 granted defendant's alternative motion to delete from the judgment all the $511,000.00 actual damages item because in the

fourth count, upon which the judgment was entered, plaintiff did not before the defendant's default demand actual damages and because Rule 54(c), F.R.C.P., precludes in default cases judgment different in kind or amount from that demanded before entry of the default. From the order so deleting actual damages, plaintiff now cross-appeals.

Rule 54(c), F.R.C.P., does specifically provide: "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. • • •".

In 6 Moore's Fed. Prac., 2 ed., Par. 54.61, pp. 1205-1206, it is said: "Since the prayer limits the relief granted in a judgment by default, the prayer must be sufficiently specific that the court can follow the mandate of the Rule. • • • • • • • • •

"Where, however, the defendant appears at the hearing on the application for judgment, the court, in the exercise of a sound discretion, may permit the claimant to amend his prayer for relief." For the latter quoted statement, the author cites only one court decision, Peitzman v. City of Illmo, 141 F.2d 956, 962 (8 Cir., 1944).

In that case, however, the United States Court of Appeals for the Eighth Circuit said that "In this connection it should be observed that the record is in a confused condition; it in fact presents a paradox", in that, pre-trial attempts in the Trial Court to effectuate on the record an increase in the demanded amount of the plaintiff's claim pursuant to notice and the court's approval order resulted instead in a decrease by one-half the amount demanded in the complaint before the attempted increase. At the trial, plaintiff moved to again amend the complaint "in the actual damages up to $5,000.00 and to amend the amount of punitive damages to $20,000.00." The Appellate Court at page 962 said that "In this state of the record it is doubtful whether the prayer for punitive damages was in fact increased in amount" since the amount of punitive damages finally stated was the same amount as that stated before any amendments were made.

That Appellate Court further stated that "Rule 54(c) apparently is a general rule applicable in case of a non-appearing defendant in complete default. On a hearing on the question of damages, under Rule 55(b) a defendant, though in default, is in

court on a hearing limited to the question of the amount of damages, to the same extent that he is in court in a trial on the merits, and we think amendments at the trial are as appropriate in the one case as in the other. Amendments to a pleading may be allowed at the hearing on damages as to the relief prayed, subject to the right of the defendant, if taken by surprise or put to a disadvantage, to ask for a continuance or for time in which to prepare to meet the enlarged claim • • •".

As to the above quoted statements from Moore's Fed Prac supra, the author did not, and plaintiff for its related contentions did not, cite any court decisions other than Peitzman, supra, a most notable and significant situation in view of the great mass of cases interpreting the Federal Rules of Civil Procedure decided subsequent to Peitzman, supra.

It must be borne in mind that the mandate of the Rule is very simple, clear and decisive that a judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment" in default cases. Peitzman, supra, was not based upon facts like those in this case, in that, the record was in a "confused condition", and was such that "In this State of the record it was doubtful whether the prayer for punitive damages was in fact increased in amount". Very likely, the court in that case in accepting the so-called trial amendment ostensibly increasing the amount of demanded damages, thought that all the court did was to put the statement of the damages demand as to amount back in the very same condition of that statement in the pleading before any changes ever were made, as the parties intended, thus correcting an obvious mistake.

In view of the foregoing, we conclude that for the reasons stated Peitzman, supra, is distinguishable from this case, and should not control or influence our decision here. Moreover, we are unable to escape the explicit and emphatic mandate of Rule 54(c) which unmistakably commands that upon the facts and circumstances of this case the judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment" at the time of the entry of the default.

Plaintiff also bases its asserted right to have retained in its judgment the $511,000.00 actual damages item on the theory that

it is entitled to invoke in aid of its deficient fourth count the allegations of the second count of the amended complaint, which according to plaintiff's contention will supply any and all additional facts and statements needed to sufficiently state in the prayer of the fourth count a particular demand for judgment for actual damages. As to that contention, however, the rule is that different causes of action must not only be separately stated, but also that each "must contain in itself sufficient averments to constitute a good cause of action", and that a valid "objection to one count is not" overcome "by an averment in another count". That was the common law rule, and it is the same under modern code pleading systems, with this condition, that allegations of one count may be incorporated by reference into another cause of action in the same complaint. 41 Am.Jur. 365, §108. Here, however, no count two allegations or damages demands were incorporated in count four.

As to that count two it is completely displaced as if dismissed by the Court's adoption of the fourth count on which to award judgment, which the Court did in harmony with plaintiff's alternative pleading of the several counts as emphasized in plaintiff's written closing statement filed August 13, 1958. The fourth count did not incorporate any statement whatsoever from the second count which plaintiff contends stated a valid cause of action, and from which plaintiff claims the right to borrow and add to count four the needed statement of demand for actual damages to sustain the Court's original award of actual damages on count four, and to support plaintiff's contention that the Trial Court should not have deleted the actual damages item from the original judgment of February 11, 1959.

Without such incorporation from count two in the fourth count, and since count two as to each and every part of it has been put out of the case by the Court's rightful use of only the fourth alternative count on which to base its judgment, no statement in count two is available for supplying the omission of actual damages from the statement of the demand for judgment in the fourth count. Whether or not count two states a valid cause of action with sufficient statement of actual damages in the demand for judgment in count two, and since count four does not itself state in its demand for judgment any request for actual damages,

we are unable to adopt plaintiff's theory that it may borrow from count two a demand for actual damages to supply the omission of such demand in count four.

Plaintiff further argues that by reason of the incorporation in the fourth count of the first count's paragraphs 5 to 19 plaintiff had the right under the contract to repossess the vessels for failure to timely scrap them, and that such right of repossession had been defeated by defendant's wrongful sale of the vessels thereby giving to plaintiff the right to be paid actual damages in addition to liquidated damages. Plaintiff in its brief asserts that at the trial on the issue of damages, defendant was advised in the course of plaintiff's opening statement that it was seeking actual damages as well as liquidated damages under plaintiff's fourth count, and that thereby defendant was notified of that fact. But count one's paragraphs 5 to 19 do not state a demand for judgment in any sum for any kind of damages. To allow plaintiff actual damages on the fourth count in which such damages were not when the default was entered requested in the demand for judgment would be a judgment different in kind and more in amount than "that prayed for in the demand for judgment".

We conclude that the Trial Court in its order of June 3, 1959 was right in deleting the item for actual damages from its original judgment, and we affirm the Trial Court's action in doing so. All of plaintiff's assignments of error are overruled.

We have examined the record regarding all the assigned errors and the related contentions and arguments of counsel. We find no reversible error in the record and the action of the Trial Court both on the defendant's appeal and the plaintiff's cross appeal is AFFIRMED.

SO ORDERED.

(Endorsed) Opinion Filed Feb 10, 1962.

Frank H. Schmid, Clerk

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 2-13-62—100

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16594

T. Y. Fong, individually and trading as Asia Development Corp. and as Hong Kong Shipping Corp., Ltd.,
Appellants,

v.

United States of America, *Appellee.*

United States of America, *Appellant.*

v.

T. Y. Fong, etc. et al.

Judgment

Appeals from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered February 10, 1962.

APPENDIX C

Amendment V—Capital Crimes: Double Jeopardy: Self-Incrimination: Due Process: Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for

the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

31 U.S.C. § 231

§ 231. *Liability of persons making false claims.*

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the

receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. R.S. §§ 3490, 5438.

Federal Rules of Civil Procedure

RULE 37.

REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

(d) *Failure of Party to Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

RULE 55.

DEFAULT

(b) *Judgment.* Judgment by default may be entered as follows:

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who had appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) *Setting Aside Default.* For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

RULE 60.

RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvert-

ence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Federal Rules of Civil Procedure involved	2
Statement	3
1. The pleadings	3
2. Petitioner's deposition	6
3. The default judgment	8
4. The damages	10
Argument	12
Conclusion	18

CITATIONS

Cases:	
Cragin v. *Lovell*, 109 U.S. 194	15
Creedon v. *Randolph*, 165 F. 2d 918	15
Ferraro v. *Arthur M. Rosenberg Co.*, 156 F. 2d 212	13
Jackson v. *Heiser*, 111 F. 2d 310	13
Kaus v. *Huston*, 35 F. Supp. 327	17
Massa v. *Jiffy Products Co.*, 240 F. 2d 702	15
Michigan Window Cleaning Co. v. *Martino*, 173 F. 2d 466	13
Montgomery Ward & Co. v. *Schumacher*, 3 F.R.D. 368	17
Northwestern Yeast Co. v. *Broutin*, 133 F. 2d 628	15
Peitzman v. *City of Illmo*, 141 F. 2d 956, certiorari denied, 323 U.S. 718	15
Pope v. *United States*, 323 U.S. 1	15

642904 62 —1

Cases—Continued

	Page
Rennie & Laughlin, Inc. v. *Chrysler Corp.*: 242 F. 2d 208	18
Sbicca-Del Mac, Inc. v. *Milius Shoe Co.*, 36 F. Supp. 623	17
Societe Internationale v. *Roger*, 357 U.S. 197	14
United States v. *Borchers*, 163 F. 2d 347, certiorari denied, 332 U.S. 811	15
United States v. *Central States Theatre Corporation*, 159 F. Supp. 552	17

Statutes and Rules:

False Claims Act:	
31 U.S.C. 231, *et seq*	3, 4
31 U.S.C. 233	4, 16
Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1611, *et seq*	4
Federal Rules of Civil Procedure:	
Rule 12(d)	5, 17
Rule 37(d)	2, 12
Rule 54(c)	11
Rule 55(b)(2)	15
Rule 55(c)	3, 13

Miscellaneous:

3 Barron & Holtzoff, *Federal Practice and Procedure:*	
§1216, pp. 85–86	15–16
§1217, pp. 89–91	13
2 Moore's *Federal Practice*, §12.16, pp. 2274–2277	17–18
6 Moore's *Federal Practice*, §55.10[2], p. 1831	13

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 955

T. Y. FONG, INDIVIDUALLY AND TRADING AS ASIA DEVELOPMENT CORPORATION AND AS HONG KONG SHIPPING CORPORATION, LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–23) is reported at 300 F. 2d 400. The opinion of the district court (R. 221–230) is reported at 182 F. Supp. 446.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1962 (Pet. App. 1–23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court abused its discretion in entering and refusing to vacate a default judgment against petitioner.

2. Whether, where the court entered a default on the issue of liability because of petitioner's willful failure to appear for deposition, petitioner was entitled under Rule 55(b)(2) of the Federal Rules of Civil Procedure to a trial on the allegations of liability in the complaint.

3. Whether, where the government brought an action against petitioner alleging, *inter alia*, a violation of the False Claims Act and petitioner was arrested and released on bond pursuant to the provisions of that Act, 31 U.S.C. 233, the district court's decision to reserve until trial its judgment on a motion to dismiss the claim deprived petitioner of rights guaranteed by the Constitution.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

* * * * *

(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper notice of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

RULE 55. DEFAULT

* * * * *

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

STATEMENT

On February 10, 1962, the court of appeals affirmed the decision of the district court which (1) entered a default judgment against petitioner; (2) awarded the United States $516,000 liquidated damages; and (3) deleted a previous award of an additional $511,000 actual damages in favor of the United States.[1] Petitioner seeks review of that decision to the extent that it affirmed the default judgment and award of $516,000 liquidated damages.

1. *The pleadings.* The action was commenced on December 31, 1956, when the United States filed a complaint seeking recovery of $764,000 damages under the False Claims Act (31 U.S.C. 231 *et seq.*) for alleged violations of a contract with the government to scrap 15 surplus vessels located in the Subic Bay

[1] The government has determined not to file a conditional cross-petition for certiorari to contest the striking of the award of actual damages because we believe that the case does not warrant the attention of this Court. However, to avoid any misunderstanding on the part of petitioners, we should state that if, contrary to the position urged in this brief in opposition, the Court should decide to hear this case and should ultimately reverse the judgments below, the United States would pursue its claims for actual damages, as well as liquidated damages, in the ensuing trial proceedings.

Reserve Fleet, Philippine Islands (R. 15–46). Pursuant to the provisions of that Act, 31 U.S.C. 233, the United States sought, and the district court ordered, petitioner's arrest on grounds that he was temporarily in this country, had immediate plans to leave and had no known assets here under his name which were subject to levy (R. 46–50).

The district court fixed bail at $50,000 (R. 48–49) and ordered that this sum be deposited in the registry of the court as security for Fong's "appearance * * * at all depositions, hearings and proceedings * * * and as security * * * that defendant will pay any judgment entered against him in accordance with the provisions of his personal bond * * *" (R. 50–51, 53–55). Petitioner was released on January 2, 1957, upon a personal bond in which he expressly agreed that (1) he would appear in court in accordance with all notices and orders, (2) he would remain within certain judicial districts in this country unless permission to leave were granted by the court and (3) he would pay any judgment to be entered against him and in favor of the United States (R. 51–53).

Following a motion of June 3, 1957 by petitioner to dismiss the complaint (R. 4), the government on July 11, 1957, filed an amended complaint (R. 55–74). This complaint, alleging the same facts on which the original complaint was founded, set forth four separate counts for damages: (1) for violation of the False Claims Act, 31 U.S.C. 231 *et seq.*; (2) for violation of the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C. App. (1946 ed.) 1611 *et seq.*; (3) for conversion; and (4) for breach of contract. The allegations of the complaint were as follows:

Petitioner purchased from the United States 15 vessels which were lying in Subic Bay, Philippine Islands (R. 59–60). He paid $271,000 for them. The purchase contract required petitioner to scrap the vessels within prescribed time limits (R. 31–60) and recited that time was "of the essence" (R. 60, 33). It provided that in the event the vessels were not scrapped within the prescribed time limits, petitioner would pay specified liquidated damages, and the government could terminate the contract and repossess the unscrapped vessels (R. 34–37, 61–62).

Contrary to his obligations under the contract, petitioner himself never scrapped any of the 15 vessels. Instead, he sold at least 13 of them, as vessels, for $1,587,500 (R. 62, 67); 3 were scrapped by vendees within an extension of time, applicable only to them (R. 64, 73); the 12 others were not scrapped within the specified time limits, although 5 of these were ultimately scrapped by petitioner's vendees. There was no evidence that the remaining 7 vessels were ever scrapped by anyone (R. 62–64). On August 2, 1957, petitioner answered the amended complaint, generally denying the allegations and asserting certain affirmative defenses (R. 94–97).

On July 12, 1957, petitioner moved to dismiss the False Claims Act count of the amended complaint for failure to state a claim on which relief could be granted (R. 75–94). After a hearing, the district court on December 4, 1957, exercising its discretion under Rule 12(d), F.R. Civ. Proc., reserved judgment on the motion. It observed that the resolution of the claim would necessitate factual inquiries and that trial

of the other three counts of the complaint would require presentation of most of the evidence material to the first count (R. 113–118).

2. *Petitioner's deposition.* Prior to the court's ruling on the motion to dismiss, the government commenced taking the deposition of petitioner in San Francisco (R. 269–294).[2] On July 23, 1957, the deposition was recessed to be resumed on ten days' notice to the petitioner (R. 269, 143). On September 4, 1957, however, counsel for petitioner informed the district court and the government that petitioner was "believed to have fled" the United States (R. 5, 99) and that they were unable to locate him through members of his family in this country and Canada (R. 105–107).

On January 17, 1958, the government filed notice of the resumption of petitioner's deposition in San Francisco on February 17, 1958 (R. 122–123). In hearings before the court on February 5 and 17 on resumption of the deposition, defense counsel stated that they had not been able to communicate with petitioner, but that they had been advised that he was somewhere in Europe (R. 294, 299–311). They proposed to have the deposition continued by written interrogatories (R. 301), but gave no reason[3] for petitioner's leaving the jurisdiction or for his continuous failure to appear in response to the district court's process. The court declared that it would not be amenable to any motion to discontinue the oral deposition; that peti-

[2] The government filed a notice of petitioner's deposition on July 11, 1957, the day the amended complaint was filed (R. 4).

[3] Petitioner's counsel did surmise that petitioner might have been "frightened" by the proceedings against him (R. 304).

tioner was "footing around all over," apparently did not want to answer inquiries on the subject of the lawsuit, and, based on his previous behavior during the taking of his deposition, should be kept, on resumption of the oral deposition, close to the control of the court (R. 307–308). The court, however, granted petitioner an extension of ten days to February 27, 1958, for resumption of the deposition (R. 311).

On February 25, 1958, eight days after petitioner had been reported to the court as somewhere in Europe, petitioner wired the court from Santiago, Chile, that he would "answer interrogatories in writing in Montevideo, Uruguay," where he would be before the end of February (R. 129, 313). He gave no reason for his prolonged absence nor any explanation of his extensive travels.

On February 27, 1958, defense counsel moved to resume petitioner's deposition solely by written interrogatories (R. 313–323). Two affidavits were submitted in support of the motion: One, by defense counsel, Robert J. Drewes, reciting his version of some of the prior proceedings in the case in an effort to demonstrate fear or intimidation as the basis of Fong's actions (R. 125–128), and a second, by a Doctor Luttgens, stating that in June and July 1957, before Fong had fled to Europe, he had treated Fong for an ulcer and hepatitis and told Fong to restrict his traveling (R. 129–130).

The district court, noting defendant's continued, unexplained disregard of its process (R. 316–318), denied the motion (R. 323). In so doing, it laid

particular emphasis on the fact that the deposition had been initiated in the United States, was to be resumed, with the agreement of all parties, in the United States, and that only defendant's fleeing the country made this impossible (R. 316–318). As to his alleged disability or illness, the court noted (R. 320):

> His home is in São Paulo [Brazil] * * *. He sent a wire from Santiago, Chile, which is on the other side of South America, says he will be in Montevideo, Uruguay, to have his deposition taken. That's some itinerary and is not particularly indicative of any substantial disability on his part.

3. *The default judgment.* On March 10, 1958, the government moved, pursuant to Rule 37(d), F.R. Civ. Proc., to strike petitioner's answer and for an order of default against him (R. 130–140), predicated on his wilful failure to appear for the resumption of his deposition. In opposition, petitioner offered an affidavit by his counsel reporting a telephone conversation with Fong on March 10, 1958 (R. 140–143). According to the affidavit, counsel informed Fong that (1) the court had denied their request that further testimony be taken by written interrogatories (R. 141); (2) the government had asked the court to strike the answer to the complaint "and to enter a judgment by default for the full amount of the damages as set forth in the Amended Complaint" (R. 141); and (3) that the government's motion would be heard on March 13, 1958, and "that there would be nothing before the Court to show that his absence from the continuation of the deposition was not wilful" (R. 141). The affi-

davit then stated that the reasons given by Fong for not returning were fear of government counsel's "personal animosity" and that he would have to put up a larger bond and might be rearrested if he returned. The affidavit did not state (1) that Fong had mentioned illness or disability as a reason for not returning or (2) that Fong did not understand the seriousness and the consequences of a default occasioned by his continued refusal to return.

After a hearing on the government's motion (R. 323–326), the court found that petitioner had wilfully failed to appear on the date set for his deposition; accordingly, it struck his answer and ordered a default on the question of liability, leaving open to both sides the opportunity for trial on the question of damages (R. 323–326, 143–145). The order allowed petitioner to move to vacate the entry of default upon a proper showing (R. 143–145).

On April 22, 1958, defense counsel moved to vacate the order of default (R. 145–146), stating that petitioner was willing to complete his deposition in Argentina and to pay for the costs of government counsel in continuing the discovery proceedings in South America (R. 154–155). Defense counsel reasserted that fear and ignorance of the true nature of the proceedings against him were the basis for Fong's prior failure to appear (R. 154–156). An affidavit of a South American physician stated that as of April 10, 1958, he felt that Fong should not travel because of a stomach ulcer (R. 153).

At the hearing on this motion on April 28, 1958 (R. 326–345), the court reiterated its previous views

and noted that present illness was no basis for explaining Fong's fleeing the United States and traveling extensively in Europe and South America prior to and including February 27, 1958 (R. 340–345). As to his supposed fear or ignorance of the judicial proceeding and the actions of the government, the court pointed out that Fong was an extremely "astute" individual "who took it upon himself to limit the extent of his own examination at some points in the deposition" (R. 341–342).

4. *The damages.* A trial on the issue of damages was held on July 7 and 8, 1958, at which both parties offered documentary exhibits in addition to testimony of witnesses (R. 345–351). On February 11, 1959, the district court entered its findings of fact and conclusions of law establishing Fong's liability to the government in the total amount of $1,027,000 of which $516,000 covered the claim for liquidated damages, and $511,000, the claim for actual damages under the government's action for breach of contract[*] (R. 230–241, 241–242). The court determined that: (1) the default established the truth of all well pleaded factual allegations; (2) petitioner was the real defendant, having used the two corporations (*i.e.*, Asia Development and Hong Kong Shipping) as mere conduits in carrying on his business; (3) the government was entitled to recover liquidated damages of $43,000 for each of the 12 vessels not scrapped by

[*] In an "order for judgment" of December 30, 1958 (R. 221–230), the court ruled that, in view of the government's willingness to accept damages alternatively and in view of the court's doubts whether the first three counts of of the complaint state a claim upon which relief could be granted, liability would be predicated on the breach of contract count (R. 223).

petitioner or his vendees within the specified time limits, or $516,000; and (4) the government was also entitled to $511,000 actual damages, measured by the total resale price received by the petitioner for 5 of the vessels which were never scrapped and as to which petitioner had deprived the government of its contractual right to repossess.

Thereafter, petitioner moved for a new trial, to set aside the judgment by default and to amend the judgment to strike the awards of liquidated and actual damages. On June 3, 1959, the district court denied the request for a new trial and refused to vacate the default or damage award (R. 251). The court, however, did strike the award for $511,000 actual damages, believing that such action was required by Rule 54(c), F.R. Civ. Proc.

Petitioner then appealed from that part of the district court's judgment entering the default and awarding liquidated damages and the government cross-appealed the deletion of the actual damage award. The court of appeals affirmed the district court's disposition of the case in all respects. With respect to the propriety of the default judgment, the court noted (Pet. App. 12; 300 F. 2d at 408–409) that it had "carefully reviewed those statements as to defendant's health" and defendant's extensive travel itinerary from San Francisco to Boston, to Montreal, Canada, "to Europe and thence to four different nations on the west and east sides of South America" and concluded that (Pet. App. 13):

> The Trial Court was amply justified in disbelieving defendant's excuses because obviously they were not made in good faith and were not

trustworthy. In fact, the whole course of defendant's conduct conclusively shows his long sustained willful disregard of the Trial Court's orders and his contumacious attitude towards the Court's authority.

ARGUMENT

Petitioner's "contumacious attitude towards the Court's authority" (Pet. App. 13), his open and flagrant defiance of the discovery proceedings, and his refusal to return or even to continue his deposition except upon terms that he attempted to dictate, justified the entry of the default judgment against him. Indeed, a failure to enter such a judgment would have meant abandonment of the only effective sanction to enforce compliance with discovery proceedings. None of petitioner's arguments militate against the correctness of the decisions below. Nor is there a conflict with any prior decisions of other courts. Hence, review by this Court is not warranted.

1. Petitioner urges that the action of the district court below in entering and refusing to vacate the default judgment constitutes such an abuse of discretion as to amount to a constitutional deprivation of due process (Pet. 2, 21–22). There was, however, no abuse of discretion here. As the court of appeals noted (Pet. App. 12, 300 F. 2d 408–409), after "carefully review[ing]" the record, petitioner's conduct fully justified the entry of the default.

Under Rule 37(d) of the Federal Rules of Civil Procedure (*supra*, p. 2), the district court "may" enter a default judgment against a party who "wilfully" fails to appear for the taking of a properly noticed deposition. Once such a default has been

entered, under Rule 55(c) (*supra*, p. 3), a party seeking to vacate the judgment must show that there was good cause for his default. *Jackson* v. *Heiser*, 111 F. 2d 310, 313 (C.A. 9); *Michigan Window Cleaning Co.* v. *Martino*, 173 F. 2d 466 (C.A. 6); *Ferraro* v. *Arthur M. Rosenberg Co.*, 156 F. 2d 242 (C.A. 2). As Barron and Holtzoff observe (3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1217, pp. 89–91):

> * * * the rules which require responsive pleadings within a limited time serve important social goals; and a party should not be permitted to flout them with impunity. In balancing [the] policies, the court should not reopen a default judgment merely because the party in default requests it, but should require the party to show both that there was a good reason for the default and that he has a meritorious defense to the action. However, the fact that defendant has a meritorious defense does not justify setting the judgment aside if no good excuse for the default is shown. The merits of the controversy will not be considered unless an adequate reason for the default is shown.

To the same effect, see 6 Moore's *Federal Practice* (2d ed.), § 55.10[2], p. 1831.

At no time has petitioner ever made a showing of good cause for his default. Thus, after the adjournment of petitioner's deposition in July 1957, petitioner, according to his attorneys (R. 5, 90), "fled" the country despite his undertaking, given in his bond, that he would make himself available for all discovery proceedings (R. 51–53). Although the resumption of the deposition was properly noticed on January

17, 1958, and a further adjournment to February 27, 1958, was granted, he did not communicate with the court until February 25, 1958, two days before the adjourned date for the resumption of the depositions and, then, only to wire from Santiago, Chile, without further explanation, that he "would answer interrogatories in writing in Montivedeo, Uruguay," where he would be at the end of February (R. 129, 313).

Petitioner's conduct cannot be squared with the explanation proffered by his attorneys. The alleged restriction upon his traveling in June 1957 because of a peptic ulcer (R. 129–130) is contradicted by the fact that between that date and February 27, 1958, he travelled from San Francisco to Boston, to Montreal, to Europe, to Sao Paulo, Brazil, to Santiago, Chile, whence he informed the court he intended to go to Uruguay. As the district court noted (R. 320), this itinerary was "not particularly indicative of any substantial disability on his part." And as that court further observed (R. 341–342), the allegation (R. 125–128) that he was intimidated by the harshness of the government's previous examination and his unfamiliarity with American court processes is without substance in light of the fact that petitioner is an "astute" individual; he had previously undertaken to limit his own examination on deposition; and the protection of the district court was available to him to prevent any such abuse.[5]

---

[5] Nothing in *Societe Internationale* v. *Rogers*, 357 U.S. 197, (Pet. 22) is to the contrary. In that case the courts concluded that there had been a "good faith" effort to comply with a pretrial production order.

2. The cases are directly contrary to petitioner's assertion (Pet. 23-24) that, notwithstanding his default, he was entitled under Rule 55(b)(2) to a trial not only on damages but on the allegations of liability as well.[6] *E.g.*, *Massa* v. *Jiffy Products Co.*, 240 F. 2d 702 (C.A. 9); *Peitzman* v. *City of Ilmo*, 141 F. 2d 956 (C.A. 8), certiorari denied, 323 U.S. 718; *Northwestern Yeast Co.* v. *Broutin*, 133 F. 2d 628 (C.A. 6); *Creedon* v. *Randolph*, 165 F. 2d 918 (C.A. 5); *United States* v. *Borchers*, 163 F. 2d 947 (C.A. 2), certiorari denied, 332 U.S. 811. These cases adhere to the self-evident proposition, challenged by petitioner without mention of these decisions, that a default on liability means that a defendant, like Fong, who, because of his willful behavior is defaulted, may no longer contest that issue.

The disposition of the issues by the court below fully accords with long-settled default procedure under the federal rules. As noted in 3 Barron and Holtzoff, *Federal Practice and Procedure*, § 1216, pp. 85-86:

> A hearing to determine whether to enter judgment by default [under Rule 55(b)(2)] is not considered a trial. If the court determines that the defendant is in default, his lia-

[6] The cases on which petitioner relies (Pet. 23) do not support his contention that, despite entry of a default against a defendant, a plaintiff must prove the truth of the factual allegations in his complaint. *Craig* v. *Lovell*, 109 U.S. 194, and *Pope* v. *United States*, 323 U.S. 1, hold that in a default case the well-pleaded factual allegations of the complaint are taken as true, but that there still remains the question of whether these facts, as pleaded, constitute a cause of action. There is no question here that the facts in the government's amended complaint establish a cause of action.

> bility to the plaintiff is deemed established and the plaintiff is not required to establish his right to recover. The allegations of the complaint except as to the amount of damages, are taken as true. If the default is established, the defendant has no further standing to contest the merits of plaintiff's right to recover. His only recourse is to show good cause for setting aside the default and, failing that, to contest the amount of the recovery.

Accordingly, on the basis of the amended complaint (the record on liability in this default case), the court correctly found (1) that Fong had breached the contract, *inter alia*, by failing to scrap, or by failing to show that anyone had scrapped, 12 of the 15 vessels within 181 days after the time limits prescribed by the contract, and (2) that Fong was a real party defendant since he completely dominated and controlled the two defendant corporations, using them as mere conduits to carry on his business (R. 56–57).

3. There is no substance to petitioner's claim that the bond placed an unconstitutional restriction on his right to travel or that the court's refusal to determine in advance of trial his motion to dismiss the False Claims Act count, under which the bail had been set, was a violation of his rights (Pet. 24–26). The short answer to the first assertion is that the bail was set by the court in accordance with the provisions of the False Claims Act, 31 U.S.C. 233, when the government showed to the court's satisfaction that petitioner was temporarily in the United States, planned to leave almost immediately and had no known assets here under his name which were subject to levy (R. 46–50).

Petitioner himself proved the wisdom of the court's determination when he breached the terms of his bond and fled to South America only nine months later. Further, the restriction on petitioner's right of travel, of which he complains (Pet. 24), was not imposed by the court (R. 50–51, 53–55), but was included in the bond proposed by petitioner (R. 51–53). The court's order for bail imposed no limitation on petitioner's right to travel beyond the requirement that he appear "at all depositions, hearings and proceedings * * *" (R. 50–51).

Nor did the court's determination to reserve until trial its ruling on the motion to dismiss deprive petitioner of any rights guaranteed by law. While the ruling meant a delay in determining the statutory basis of the False Claims Act count, as petitioner contends (Pet. 24), this is envisioned by the federal rules and is a necessary part of the orderly procedures which they establish. Thus, the complexity of the cause, the fact that appraisal of the claim "necessitates factual inquiries" and "cannot and should not be made upon the pleadings alone" and that there would have to be, in any event, a trial on the other three counts (R. 117–118) clearly warranted the court's exercise of the discretion afforded by Rule 12(d), F.R. Civ. Proc., to reserve judgment on the motion. *Montgomery Ward & Co. v. Schumacher,* 3 F.R.D. 368 (N.D. Calif.); *United States* v. *Central States Theatre Corporation,* 159 F. Supp. 552 (D. Neb.); *Kaus* v. *Huston,* 35 F. Supp. 327 (N.D. Iowa); *Sbicca-Del Mac, Inc.* v. *Milius Shoe Co.,* 36 F. Supp. 623 (D. Mass.). See, also, 2 Moore's *Fed-*

eral Practice (2d ed.), § 12.16, pp. 2274–2277.[1] Further, since petitioner had fled the country and breached the conditions of his bond before the court had an opportunity to rule on his motion to dismiss, he is in no position to complain that thereafter the court determined to reserve judgment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

MORTON HOLLANDER,
JEROME I. LEVINSON,
Attorneys.

JUNE 1962.

[1] Petitioner's citation (Pet. 25) of False Claims Act cases disposed of on a motion to dismiss in no way supports the proposition that he seeks to sustain here, *i.e.*, that the deferral of a ruling on the motion to dismiss amounts to a denial of constitutional due process. Indeed in *Rennie & Laughlin, Inc.* v. *Chrysler Corp.*, 242 F. 2d 208, 213 (C.A. 9), the court noted that motions to dismiss are inappropriate where facts must be developed and the claim is not frivolous. Here, of course, there were substantial questions of fact to be resolved, concerning the statements of Fong and others with regard to scrapping of the vessels.

U. S. GOVERNMENT PRINTING OFFICE 1962